



DEPARTMENT OF THE NAVY
OFFICE OF THE JUDGE ADVOCATE GENERAL
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IN REPLY REFER TO:

5720

Ser 14/167

February 22, 2023

SENT VIA EMAIL AND FOIA ONLINE

Mr. (b) (6)

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**SUBJECT: FREEDOM OF INFORMATION ACT (FOIA) REQUEST DON-NAVY
2022-013452; FOIA APPEAL DON-NAVY-2023-003533**

This letter responds to your December 20, 2022 FOIA appeal, which was submitted on December 21, 2022, but received by my office on January 4, 2023 and assigned tracking number DON-NAVY-2023-003533. Your underlying request was submitted to the Secretary of the Navy/Chief of Naval Operations FOIA Office (DNS-36), the initial denial authority (IDA), on September 28, 2022 and assigned tracking number DON-NAVY-2022-013452. In your request, you sought any and all copies of videos pertaining to unidentified aerial phenomena (UAP) in the custody of the Chief of Naval Operations for Information Warfare. You also specified that you sought "all processing notes associated with the processing of your request."

On November 28, 2022, the IDA issued its final disposition of your request, granting your request in part. The IDA informed you that records responsive to your request had been uploaded to the Naval Air System Command's FOIA Reading Room on or about April 28, 2020 and provided you a link to access those records. However, the IDA also informed you that the remaining records responsive to your request would be withheld under FOIA exemption (b)(1).

You appeal the IDA's final disposition of your request, contending that the IDA's application of FOIA exemption (b)(1) was inappropriate. You also contend that the IDA did not produce any of the "processing notes" regarding your request and assert that "[you] will file a new FOIA request seeking them."

Your appeal is a request for a final agency determination under the FOIA. For the reasons stated below, your appeal is denied.

There are two preliminary matters I wish to address before evaluating your challenge to the IDA's application of FOIA exemption (b)(1). First, I note that, in your appeal, you

state that you “requested that all processing notes associated with [your] request be provided. None were. If processing notes are not provided as a result of this appeal, [you] will file a new FOIA request seeking them.

This is not a proper matter for appeal. Pursuant to the FOIA, the Department of the Navy has established procedures and requirements for appeals of an adverse IDA determination. SECNAVINST 5720.42G sets forth the requirements of a FOIA appeal. Specifically, SECNAVINST 5720.42G, enclosure (2), paragraph 1e(5)(f)1 requires a FOIA requester to provide, as part of the written appeal, “[a]n explanation why the appeal should be granted.” Here, you merely assert that “[i]f processing notes are not provided as a result of this appeal, [you] will file a new FOIA request seeking them.” However, you have failed to state a challenge to the IDA’s final disposition in this regard, nor do you state any reason why your appeal should be granted. Therefore, I am closing this portion of your appeal with no further action.

Even if I had not denied this portion of the appeal as improper, I would have still denied it as it seeks records that had yet to be created and thus, were not agency records at the time that you submitted your request. The Supreme Court articulated a two-part test in *DOJ v. Tax Analysts* for determining when a “record” constitutes an “agency record” under the FOIA: “[A]gency records” are records that are (1) either created or obtained by an agency, and (2) under agency control at the time of the FOIA request. 492 U.S. 136, 144–45 (1989). “Agency control” is determined using a four-part test: (1) the intent of the document’s creator to retain or relinquish control over the record; (2) the ability of the agency to use and dispose of the record as it sees fit; (3) the extent to which agency personnel have read or relied upon the document; and (4) the degree to which the document was integrated into the agency’s record systems or files. *Burka v. HHS*, 87 F.3d 508, 515 (D.C. Cir. 1996) (quoting *Tax Analysts v. DOJ*, 845 F.2d 1060, 1069 (D.C. Cir. 1988)).

Your September 28, 2022 request pertaining to these “records” specifically sought “all processing notes associated with *the processing of your request*.” Your request, however, sought records that had yet to be created. *See id.*; *see also Jud. Watch v. Fed. Hous. Fin. Agency*, 646 F.3d 924, 928 (D.C. Cir. 2011) (“[W]here an agency has neither created nor referenced a document in the ‘conduct of its official duties,’ the agency has not exercised the degree of control required to subject the document to disclosure under FOIA”) (quoting *Tax Analysts*, 492 U.S. at 145)). Therefore, as the IDA had not created “processing notes associated with the processing of your request” prior to your request on September 28, 2022, I find that you have not sought “agency records” subject to the FOIA. Accordingly, your appeal on these grounds is denied.

I now turn to your contention that the IDA’s inappropriately withheld responsive records under FOIA exemption (b)(1). Under exemption (b)(1), federal agencies must

withhold information that is “properly and currently classified in the interest of national defense or foreign policy, as specifically authorized under the criteria established by Executive Order and implemented by regulations.” *See* 5 U.S.C. § 552(b)(1); 32 C.F.R. § 701.59(a). Pursuant to Executive Order 13,526, information regarding military plans, weapons systems, or operations are properly classified. 3 C.F.R. § 13526. If potentially responsive information qualifies as exemption (b)(1) information, there is “no discretion” regarding its release. 32 C.F.R. § 701.59 (a)(2). When an agency relies on exemption (b)(1), the agency is afforded wide deference by the courts. *Students Against Genocide v. Dep’t of State*, 257 F.3d 828, 837 (D.C. Cir. 2001); *Doherty v. DOJ*, 775 F.2d 49, 52 (2d Cir. 1985). Thus, to support citing this exemption, “little proof or explanation is required beyond a plausible assertion that information is properly classified.” *James Madison Project v. CIA*, 605 F. Supp. 2d 99, 110 (D.D.C. 2009). However, when invoking exemption b(1), denial authorities must comply with the FOIA’s general requirement that agencies segregate and release nonexempt information.

Pursuant to the FOIA, “[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.” 5 U.S.C. § 552(b). Agencies shall “consider whether partial disclosure of information is possible whenever the agency determines that a full disclosure of the record is not possible.” 5 U.S.C. § 552(a)(8)(A)(ii). Under this provision, “agencies and courts [must] differentiate among the contents of a document rather than . . . treat it as an indivisible ‘record’ for FOIA purposes.” *Fed. Bureau of Investigation v. Abramson*, 456 U.S. 615, 626, 102 S. Ct. 2054, 72 L. Ed. 2d 376 (1982). District courts “must make specific findings of segregability regarding the documents to be withheld.” *N.Y. Times Co. v. United States FDA*, 529 F. Supp. 3d 260, 289 (S.D.N.Y. 2021) (citing *Color of Change v. U.S. ‘Dep’t of Homeland Sec.*, 325 F. Supp. 3d 447, 455 (S.D.N.Y. 2018) (quoting *Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106, 1116, 377 U.S. App. D.C. 460 (D.C. Cir. 2007))).

Agencies need not, however, disclose non-exempt information that is “inextricably intertwined” with exempt information. *See Hopkins v. U.S. Dep’t of Hous. & Urban Dev.*, 929 F.2d 81, 85 (2d Cir. 1991). Information is deemed inextricably intertwined where “disclosure would compromise the confidentiality of [exempt] information that is entitled to protection.” *Id.* However, you are not entitled to disclosure if disclosure would produce only a “few nuggets of non-intertwined, ‘reasonably segregable’” information. *Gonzalez v. United States Citizenship & Immigration Servs.*, 475 F. Supp. 3d 334, 353 (S.D.N.Y. 2020); *Lead Indus. Ass’n, Inc. v. Occupational & Health Safety Admin.*, 610 F.2d 70, 88 (2d Cir. 1970); *see also Am. Civil Liberties Union v. Dep’t of Justice*, 252 F. Supp. 3d 217, 227-28 (S.D.N.Y. 2017) (collecting cases). To the extent that there may be bits of non-exempt information in the responsive documents, the IDA should provide information to illustrate that such information is either inextricably intertwined with the exempt information or are the kinds of “nuggets” that are not required to be provided to

requestors under the FOIA. *Gonzalez*, 475 F. Supp. at 354. Courts recognize, however, that reasonable segregation is not possible when nonexempt information is inextricably intertwined with exempt information. *Mead Data Center v. Dep't of the Air Force*, 566 F.2d 242, 261 (D.C. Cir. 1977).

After receiving your appeal, my office contacted the IDA to seek additional information about the processing of your request. My office was informed that the IDA consulted with the original classification authority (OCA) in this case. The IDA also informed my office that the responsive records were reviewed by an OCA subject matter expert, who determined that the responsive records were properly classified and that no segregation was possible. As the Department of the Navy's (DON) appellate authority for FOIA appeals, I must defer to the classification authority's expertise regarding the classification of the information in question related to national security. I am satisfied that the IDA's classification of the records responsive to your request satisfies the requirements under FOIA exemption (b)(1), as the responsive records at issue were reviewed for classification by the appropriate official and no information can be segregated and potentially released. Accordingly, your appeal on these grounds is denied.

As the Department of the Navy's designated adjudication official for this FOIA appeal, I am responsible for its denial. You may seek judicial review of this decision by filing a complaint in an appropriate U.S. District Court. My office represents the U.S. Government and is therefore unable to assist you in this process.

You have the right to seek dispute resolution services by contacting the Department of the Navy's FOIA public liaison, Mr. Christopher Julka, at christopher.a.julka@navy.mil or at (703) 697-0031. You may also seek dispute resolution services from the Office of Government Information Services (OGIS), the Federal FOIA Ombudsman's office, at (202) 741-5770 or ogis@nara.gov.

If you have further questions or concerns for my office, my point of contact is LT (b) (6), JAGC, USN, who may be reached at (b) (6) or by email at (b) (6).mil@us.navy.mil.

Sincerely,

(b) (6)

S. D. SCHROCK

Director

General Litigation Division

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Copy to:
DNS-36
DON CIO